

Message Text

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ACTION EUR-12

INFO OCT-01 IO-10 ISO-00 AID-05 CEA-01 CIAE-00 COME-00

EB-07 EA-06 FRB-01 INR-05 NEA-06 NSAE-00 RSC-01

OPIC-03 SP-02 TRSE-00 CIEP-01 LAB-04 SIL-01 SWF-01

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TAGS: EFIN, OECD

SUBJECT: INVISIBLES CODE AND EXISTING LINER CONFERENCES

REFS: A. GENEVA 7303

B. USOECD 28559 AND USOECD 28999

C. OECD DOC. DAF/INV/74.46 (1ST REVISION)

D. OECD DOC. DAF/INV/74.46 (2ND REVISION)

1. REF A TAKES POSITION THAT, CONTRARY TO CHAPTER II OF
REF D, INVISIBLES CODE MAY REQUIRE AFFIRMATIVE GOVERNMENT
ACTION TO ELIMINATE RESTRICTIVE PRACTICES AGREED TO
PRIVATELY BY LINER CONFERENCES. IN OUR VIEW, HOWEVER,
NOTE 1 OF INVISIBLES CODE DOES NOT REQUIRE AFFIRMATIVE
GOVERNMENT ACTION OF THIS TYPE, ALTHOUGH IT DOES NOT
PRECLUDE SUCH ACTION EITHER. HOWEVER, IF SO-CALLED
PRIVATE CONFERENCES ARE IN ANYWAY SUSTAINED OR SUPPORTED BY
GOVERNMENTS (EITHER DIRECTLY OR INDIRECTLY), WE BELIEVE
GOVERNMENTS WOULD THEN HAVE AN OBLIGATION TO REMOVE ANY S
SUPPORT WHICH LEADS TO RESTRICTIVE PRACTICES WHICH WOULD
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PREVENT THE EFFECTIVE EXERCISE OF TRANSACTIONS COVERED

BY THE OECD CODE.

2. THUS, PARA 30 OF REF D IS ESSENTIALLY CORRECT WHEN IT SAYS THAT OECD CODE REGULATES GOVERNMENTAL ACTION AND CALLS FOR REMOVAL OF OFFICIALLY IMPOSED RESTRICTIONS. FORMER PARA 40 REF C (LATER SUPPRESSED) NOTES THAT "LINER CONFERENCES ARE BASED ON PRIVATE ARRANGEMENTS AND, IN THE ABSENCE OF ANY REFERENCE THERETO, IT CANNOT BE ASSUMED THAT IN THE AREA OF MARITIME TRANSPORT--AND IN THAT AREA ALONE--THE CODE ENTAILS OBLIGATIONS FOR GOVERNMENTS" TO TAKE POSITIVE ACTION AGAINST RESTRICT SHIPPING PRACTICES OF LINER CONFERENCES. SUBJECT TO THE LAST SENTENCE IN PARA 1 ABOVE, OUR VIEW WOULD BE THAT THE OECD CODE REQUIRES ONLY THAT GOVERNMENTS REFRAIN FROM TAKING ACTION THEMSELVES WHICH WOULD BE CONTRARY TO "THE PRINCIPLE OF FREE CIRCULATION OF SHIPPING IN INTERNATIONAL TRADE IN FREE AND FAIR COMPETITION". THIS POSITION IS CONSISTENT WITH INTERPRETATION OF CODE IN BROADER SENSE THAT OBLIGATION TO LIBERALIZE REQUIRES GOVERNMENTS TO REFRAIN FROM INTRODUCING RESTRICTIONS (OR FROM SUPPORTING RESTRICTIVE ACTIONS BY PRIVATE PARTIES) BUT NEVER SPECIFICALLY REQUIRES THEM TO INTERVENE TO PREVENT PURELY PRIVATE BODIES FROM TAKING RESTRICTIVE MEASURES.

3. IN GENERAL WE THINK THAT PARAS 31 AND 32 OF REF C CORRECTLY REFLECT POSITION OF GOVERNMENTS UNDER NOTE 1 WITH REGARD TO RESTRICTIVE PRACTICES OF LINER CONFERENCES HOWEVER, WE THINK PARA 29 GOES TOO FAR AND LACKS BALANCE OF PARAS 31-32. AT INVISIBLES COMMITTEE MEETING NOVEMBER 22, US EXPERT PRESSED FOR DELETION OF PARA 29 BUT WAS UNSUCCESSFUL.

4. WHEN IC REPORT COMES UP IN PAYMENTS COMMITTEE, WE WOULD LIKE TO TAKE POSITION EITHER (A) THAT NOTE 1, WHILE CREATING NO OBLIGATION TO CURB PRIVATE RESTRICTIVE PRACTICES (EXCEPT WHEN SUPPORTED BY GOVERNMENTS), NEVERTHELESS DOES NOT PREVENT GOVERNMENTS FROM TAKING MEASURES CONSISTENT WITH THIS CODE TO PREVENT PRIVATE MONOPOLISTIC PRACTICES, OR (B) THAT THIS ISSUE IS STILL AN OPEN QUESTION WHICH REQUIRES FURTHER DISCUSSION IN IC OR (C) LIMITED OFFICIAL USE

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NOT MENTION IT AT ALL. WE WOULD APPRECIATE DEPARTMENT'S FURTHER COMMENT ON THIS ISSUE AND PREFERENCES FOR US POSITION (IF ANY) IN PC PRIOR TO OPENING OF BUSINESS DECEMBER 9.
TURNER

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